BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of: BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers.	WC Docket No. 03-251

REPLY COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND OF THE PEOPLE OF THE STATE OF CALIFORNIA

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The California Public Utilities Commission and the People of the State of California (CPUC or California) submit these reply comments in opposition to the Emergency Request for Declaratory Ruling (Petition) of BellSouth Telecommunications, Inc. (BellSouth), filed on December 9, 2003. In its petition BellSouth asks the FCC to issue a declaratory ruling based on an overly narrow characterization of the issues involved and an overly expansive reading of the Triennial Review Order (TRO)[1]. Several of the comments suggest that the issues raised in the Petition are red herrings and the FCC should decide this case on a different basis. If the FCC did grant the Petition, doing so would give the FCC's unbundling rules an overbroad preemptive effect that cannot be

[1] Unless otherwise indicated, citations to the TRO will refer to paragraph (¶) number.

supported by law. Under current law, DSL service is classified as a telecommunications service, not an information service. The FCC has further acknowledged that DSL service may be intrastate, and is not exclusively subject to federal regulation. The Petition, therefore, should be denied.

I. INTRODUCTION

BellSouth's petition asks the FCC to preempt state law and state commission orders affecting BellSouth's provision of DSL service on the basis that the TRO's line sharing rules could be read—expansively—to apply to the state orders BellSouth challenges. As many of the comments, especially those filed by CLECs and the states, reveal the scope of the issues raised by the Petition is far broader than the narrow basis BellSouth asks the FCC to rely upon in granting the Petition.

The Petition asks the FCC to issue a declaratory order relying on the language of the TRO, suggesting that the question here is only whether or not the TRO's unbundling rules are broad enough to apply to the actions several states have taken. The FCC, however, should not resolve this case by mechanically applying the language of the TRO. Instead, the FCC should consider whether or not state commission orders that prevent an ILEC from acting anticompetitively by denying customers a choice of providers of local voice service when these customers purchase the ILEC's DSL service falls within the ambit of the FCC's line sharing rules at all. The FCC should also consider whether the orders of the four states in question have in fact required the ILEC to offer DSL service as a UNE and price it accordingly—or whether these states have simply held that the

ILEC may not offer DSL service bundled with voice service, and thereby deny customers a choice of voice service providers. Similarly, the FCC should consider whether the four state orders are best thought of as orders that address impermissible bundling of other services with the ILEC's voice service. If the FCC determines to resolve this proceeding on the basis suggested in the Petition, the FCC should nevertheless take into account how BellSouth's provision of DSL service affects its provision of other services. The FCC also should consider whether BellSouth's bundled offering of DSL and local services is consistent with state and federal mandates that foster competition and prohibit anticompetitive practices.

Moreover, the FCC should consider whether or not the state orders in question should be preempted. The state proceedings described in the Petition reveal the importance customers in Florida, Kentucky, Louisiana, and Georgia attach to their high-speed internet access service. These state commissions found that customers' desire to avoid interruptions in their broadband service had significant effects on the provision of local and intrastate voice service. State commissions must have the ability to exert some control over the way DSL service is provided if they are to follow state and federal mandates fostering competition. "The Act was designed to . . . protect competition in the industry while allowing states to regulate to protect consumers against unfair business practices such as slamming." *Communications Telesystems International v. California Public Utility Commission*, 196 F.3d 1011, 1017 (9th Cir. 1999).

Finally, the FCC should evaluate whether or not the TRO's line sharing rules legally can be read to preempt the actions of the four state commissions. As California has argued in the past, principles of preemption law do not give the TRO such a broad preemptive effect. California has already expressed its concerns with language in the TRO holding that state orders on line sharing are likely to conflict with, and substantially prevent, implementation of the federal scheme simply because the FCC "otherwise declined" to unbundle that element. TRO ¶ 195. That issue is a matter of dispute and, presumably will be resolved in the courts. However, by asking the FCC to implement the line sharing language in a way that produces the *most preemption possible* with little regard to the underlying facts, the Petition creates a situation that is far more stark than the one the FCC and the states presented to the appellate court. BellSouth asserts broad claims about the extent to which DSL's components are interstate, and that DSL's regulatory classification is that of an information service only. These claims are in conflict with current federal law, and do not otherwise demonstrate that states have no role in regulating some aspects of DSL service. *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 665 (D.C. Cir. 2001), *In re GTE Telephone Operating Cos.*, 13 FCC Rcd 22466 (1998).

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II. THE PETITION DOES NOT ADDRESS THE REAL ISSUES RAISED BY THE STATE ORDERS IN QUESTION AND INSTEAD INVITES THE FCC TO PREEMPT STATE LAW IN A WAY THAT IS NOT SUPPORTABLE

A. The States Have a Legitimate Role to Play Under the Act, Which Includes Oversight of DSL Service, If Necessary

The findings made by the four states whose orders are challenged here suggest that customers place a very high importance on obtaining and then continuing to maintain a relationship with a DSL service provider. The CPUC has not yet considered whether the way DSL services are provided in California has an effect on competition for other services, and, if so, whether or not that effect would be adverse or beneficial. However, the CPUC has learned that Californians place a high value on receiving uninterrupted high-speed internet access.

In 2001, the CPUC was required to provide emergency injunctive relief to prevent 40,000 customers from loosing their high-speed internet connections before they could arrange other service. *XO California v. NorthPoint Communications*, CPUC D.01-04-008, 2002 Cal. PUC LEXIS 378 (2001). The CPUC has also decided to examine aspects of DSL service quality because it is aware that "today's customers depend on more complex services, including DSL[,] for internet access." *Rulemaking into Service Quality Standards for All Telecommunications Carriers* CPUC R.02-12-004, 2002 Cal. PUC LEXIS 868 (2002).

The Comments filed in this proceeding strongly suggest that customers' attachment to their DSL service can have an effect on the voice market. For example, MCI highlights two different scenarios addressed in the state commission orders BellSouth challenges. First, "customers are locked in because they have no alternative: BellSouth is the only available broadband provider. Particularly, for many small and medium sized businesses who are not served by cable modem service, BellSouth is the only broadband choice." MCI Comments, p. 4. Second, even when another broadband provider exists "the many impediments to switching broadband service providers make these options impractical." MCI Comments, pp. 4-5. If these contentions are accurate, the states' ability to exercise their authority to remedy these situations—set forth in sections[2] 251(d)(3), 252(e), 253(b) and 414—should be preserved.

B. The Comments Suggesting that this Case Should Not Turn on Unbundling Questions Are Worthy of Note

Comments filed by several CLECS suggest that the language the Petition relies upon does not even apply to the state orders BellSouth challenges. Z-Tel asserts that the FCC's unbundling rules "*only* address the situation in which a CLEC provides DSL and the ILEC provides analog voice service." Comments of Z-Tel Communications, Inc., p. 17 (emphasis in original). Z-Tel also asserts that no unbundling (either or the high frequency or the low frequency portion of the loop) occurs here.

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[2] Unless otherwise specified all section references indicate the Telecommunications Act of 1996, most of the relevant portions of which are codified at 47 U.S.C. § 251, et seq.

These comments are worth considering. Here, state regulation does not frustrate the will of Congress, and it only allegedly interferes with the rules established by the FCC if those rules are extended to apply to a situation that does not appear to have been contemplated by the Commission when the rule was adopted.

C. If the Petition is Granted, it Will Demonstrate Why the FCC Must Review the TRO's Approach to Preemption

The Petition does not give serious weight to the factual information developed by the state commissions whose orders it challenges. Instead, the Petition asks the FCC to preempt state commission orders simply because the Petition is capable of characterizing the states' orders as inconsistent with the FCC's line sharing rule. Several of the CLECs question whether the TRO's discussion of line sharing can have the effect of completely preventing state commissions from taking any action that affects ILEC- provided DSL service to customers who chose a CLEC to provide voice service. As MCI's comments recite, the four state commissions based their orders on factual records demonstrating that problems existed with the way BellSouth made its DSL service available and crafted remedies the evidence indicated would be appropriate. MCI Comments, pp. 4-12. Comments filed by Z-Tel Communications, Inc. (Z-Tel) specifically lay out state Commission findings that BellSouth "insulates voice service from competition" (Georgia), "unreasonably penalizes customers who desire" CLEC voice service (Florida), has "anticompetitive effects" (Louisiana), and a "chilling effect on competition … and in

the long run will result in the fewer viable CLECs and fewer customer options" (Kentucky). Comments of Z-Tel, pp. 6-7.

California has already argued that the line sharing rules in the TRO impermissibly seek to preempt state law because those rules do not account for the specific facts that exist in each state.[3] Yet the Petition now asks the FCC to conclude that its line sharing rules have a broad preemptive effect that can be invoked by carriers *despite* evidence that certain carriers have used DSL to discourage customers from exercising a choice of local voice service providers in specific markets. The Petition thus seeks to preempt state orders that are designed to foster competition in voice markets. If the FCC concludes that it should preempt state orders that foster competition in local and intrastate voice markets or halt anticompetitive or otherwise illegal practices relating to DSL, it would impermissibly eliminate the states' role under the Act.

Specifically, section 251(d)(3) plainly preserves state authority when a state's action does not conflict with or substantially prevent implementation of the Act's unbundling provisions. California has already argued that the TRO cannot prevent states

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[3] For example the national finding that "cable modem service is the most widely used means by which mass-market obtains broadband service[]" (TRO ¶ 262) does not take into account the state of competitive impairment in any particular market . The CPUC has made a contradictory finding about the California market: there is a lack of affordable, ubiquitously available broadband service options provided by alternative cable modem, satellite and wireless technologies. *Rulemaking to Govern Open Switch Access Bottleneck Service* Cal P.U.C. Decision No. (D.) 03-01-077, mimeo at 14, 2003 CAL PUC LEXIS 80 (2003) (citing data provided by California ILECs and the California Cable Telecommunications Association). DSL is clearly the leading form of broadband access in California. Although the TRO noted that cable modem service is provided over nine million lines, which is approximately 57% of all high-speed lines (*TRO* ¶ 262*,* n. 777), in California, according to the FCC's latest statistics on the more than 1.4 million California subscribers, DSL has a 26% lead over cable modem deployment. Further, one-third of all Californians live in cities where DSL is the only choice for broadband service. *Id*

from requiring linesharing as a UNE because of this reservation of state authority. This claim was based on a situation where the FCC's rules relied on national findings and did not analyze the impairment on a granular basis that looked to the states' particular market conditions. If the FCC preempted state orders in this case, the FCC's order would not merely be based on national findings (rather than granular market specific analysis), it would, in fact, run directly counter to the facts adduced by four states that did undertake such an analysis. If the FCC were put in the position of having to apply its unbundling rules in a way that prevented states from taking action to implement competition for local and intrastate voice services, the contradiction between the FCC's unbundling rules and the reservation of state authority in the Act would become stark.[4]

Moreover, the nature of the Petition's request is such that the FCC would not be able to support the preemptive effect of its unbundling rules for line sharing by claiming them to be part of a "federal regime" which states may not thwart despite the savings clause in section 251(d)(3). California does not agree, as a general matter, that the FCC can read its rules into the statutory scheme. Here, however, it is clear that this rationale, even if valid, would not support FCC action granting the Petition. The states in this case appear to be implementing the purposes of the Act by fostering voice competition and preventing anticompetitive business practices, as several CLEC comments point out. Interestingly, several of the CLECs note that the Petition focuses its preemption claims on

[4] Additionally comments point out that several of the state orders in question are arbitrations governed by section 252 and subject to the reservation of state authority under section 252(e), among other things.

the text of the FCC's unbundling rules and does not present a detailed argument in favor of the result BellSouth seeks. *E.g.,* Comments of MCI, p. 11. The text of an agency decision, interpreted without regard to whether or not it implements the underlying statue cannot, alone, be a legitimate source of preemption when Congress has determined that state laws consistent with the statute itself will not be preempted.

The FCC appears to acknowledge this point when the TRO suggests that preemption would arise only where state orders "substantially prevent" implementation of the federal regime. TRO ¶ 192. California believes this is a superior result to the result advocated in the Petition, i.e., that the TRO has already established a framework of rules preempting state action. MCI's comments argue, at p. 18, that the effect of TRO ¶ 195, relied upon by the Petition, is unclear, given the TRO's earlier references to state authority and the FCC's defense of the TRO in Appellate Court. AT&T/Comptel/Ascent contend that the TRO does not "already preempt[]" the state orders in question, in part relying on the FCC's brief defending the TRO. Comments of AT&T, Comptel/Ascent Alliance, p. 21. California believes that the TRO is problematic because it invites petitions such as Bell South's to be filed—on an expedited basis—on the theory that state law has already been preempted. If the Petition is granted and the FCC confirms that future inquiry concerning state unbundling will be as simplistic as the Petition suggests, then the FCC will have demonstrated that the TRO's preemptive effect is impermissibly broad.

Finally, the relief requested in the Petition highlights California's concern with the FCC's decision to use its unbundling rules to pre-determine the end result of a state's market specific unbundling analysis. If a market specific analysis shows that the application of FCC's unbundling rules is not sufficient to produce competition in a particular market, states should not be preempted when they attempt to achieve the goals of the Act. California has asserted that the States' role is to co-administer §251's market-opening mechanism of unbundling, utilizing the impairment standard developed by the FCC, on a granular basis, by applying that standard to the State's particular market conditions. Admittedly, states should not circumvent the FCC's impairment standard or thwart Congress' goal of opening local markets to competition. However, California has asserted that the FCC may not use its unbundling rules to dictate the *end result* of the state's granular market specific analysis and prevent the states from craft an appropriate solution that both respects the FCC's impairment standard and takes into account specific conditions in that state's market. (Cf., § 251 (d)(3)(B), (C); *Iowa Utilities Board v. FCC* 120 F.3d at 806 (8th Cir. 1997).

The Petition's request for relief implies that states may avoid preemption only by producing orders that achieve an end result pre-determined by the TRO. In fact, the state authority preserved under §251(d)(3) is properly measured by consistency with the Act, not conformance with FCC regulations. As the Eighth Circuit has noted, §251 "does not require all State commission orders to be consistent with all of the FCC's regulations promulgated under section 251 . . . It is entirely possible for a State interconnection or

access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251." *Iowa Utilities Bd., 120* F. 3d at 806. Moreover, the Sixth Circuit, in recently considering the States' role under §251, noted "[t]he Act permits a great deal of State commission involvement in the new regime it sets up for the operation of telecommunications markets, 'as long as State commission regulations are consistent with the Act.'" *Michigan Bell v. MCI Metro Access Services*, 323 F. 3d 348, 358 (6th Cir. 2003) (quoting *Verizon North v. Strand,* 309 F. 3d 935,944 (6th Cir. 2002))(emphasis added). A federal court reviewing the Kentucky order challenged here concluded that "the 1996 Act makes room for state regulations and orders and requirements of state commissions …" and that Kentucky's order was just such a requirement. *BellSouth Telecommunications v. Cinergy Communications* 2003 U.S. Dist. LEXIS 23976, LEXIS pp. 19-20 (E.D. Kentucky 2003).

D. States are In the Best Position to Determine if the Way DSL Service is Implemented is Anticompetitive, and, if so, to Craft Appropriate Remedies

The Petition is particularly troubling because it does not address in any detail the specific factual situations faced by the states and asks the FCC to mechanically apply certain language in the TRO to preempt state orders. Several of the commenters assert that the behavior of the ILEC in question is particularly egregious. The CPUC noted these comments, out of a concern that California not be placed in a situation where it could not take action to address clearly problematic behavior in California merely because

that behavior was not predominant on a national level or because its solution might not work in other states.

III. THE FACT THAT DSL SERVICE INCLUDES COMPONENTS THAT QUALIFY AS INTERSTATE SERVICE DOES NOT CREATE THE PREEMPTIVE EFFECT BELLSOUTH CLAIMS

The CPUC previously has determined that because DSL transport has a mixed interstate and intrastate nature, the regulation of aspects of DSL service is not preempted because there is no "clear and manifest" Congressional intent to preempt state authority in all cases. *CISPA v. Pacific Bell*, Cal. P.U.C. Decision No. (D.) 03-07-032, 2001 Cal. PUC LEXIS 1232, Appendix A, at p. 6 (2003), *citing Jones v. Rath Packing*, 430 U.S. 519, 525 (1977); *DSLExreme.com v. Pacific Bell* Cal. P.U.C. Decision No. 04-01-040, at p. 38 (2004).

Both section 253(b) and section 414 reserve to the states the power to protect the health, safety, and welfare of state citizens. Similarly, in *Communications Telesystems International v. California Public Utilities Commission*, 196 F.3d 1011, 1017 (9th Cir. 1999) the court found federal preemption of state telecommunications regulations "must be clear and occurs only in limited circumstances." Many of the Comments in this proceeding have made this same point. As a result, states may impose requirements to safeguard the rights of consumers and they may enforce their own laws as to activities involving interstate communications in order to foster the competitive provision of services on fair and nondiscriminatory terms. *CISPA v. Pacific Bell*, D.03-07-032, at pp. 3-4 2001 Cal. PUC LEXIS 1232, at LEXIS pp. 3-4.

Moreover, state regulation of DSL transport is not preempted as a result of the FCC's 1998 GTE order. *See In the Matter of GTE Telephone Operating Cos.,*13 FCC Rcd 22466 (1998). Despite claims to the contrary, including those made in Verizon's comments, nothing in that decision amounts to an explicit bar of state regulation. As a result, under the appropriate jurisdictional test, the 1998 GTE order cannot be read to prevent state commissions from exercising jurisdiction over appropriate aspects of DSL transport service. While the FCC may unquestionably require an interstate DSL tariff, the rationale used to require federal tariffing cannot necessarily be relied upon to support complete federal preemption of DSL transport. In cases where a state commission does not intrude on areas covered by the federal tariff there is no reason to conclude that its actions would be preempted by federal law. SBC advances in its comments arguments similar to those it has advanced before the CPUC, and the CPUC urges the FCC to reject those arguments.

Additionally, current law does not appear to support the contention that DSL service must be considered an information service, as many comments point out.

IV. CONCLUSION

California urges the FCC to deny the Petition because it asks the FCC to undertake a preemption effort that is beyond the scope of the FCC's authority. The TRO's line sharing rules do not form a sufficient basis for the preemption sought by BellSouth, as the overwhelming weight of the various comments point out. Similarly, the Petition does not

correctly analyze the effect that DSL service's jurisdictionally mixed nature has on state jurisdiction.

Respectfully submitted,

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